IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

ORDER

S.B. Sales Tax Revision Petition No. 52/2007

Commercial Taxes Officer,
Works Contract & Leasing Tax, Alwar

Versus

M/s. Naresh Chand Diwedi
¼, Vivekanand Nagar, Alwar

::

Date of order :: September 19, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Amit Ratnawat on behalf of Mr. R.B. Mathur for the petitioner-Revenue
None present for the respondent-assessee

REPORTABLE

BY THE COURT (ORAL):

1. Heard learned counsel for the petitioner-Revenue. None appeared on behalf of respondent-assessee despite service.

2. This revision petition is directed against the order of the Tax Board

dated 21.08.2006, whereby the Tax Board rejected the appeal of the Revenue upholding the order of the learned Deputy Commissioner (Appeals) dated 23.11.2004 and thus, both the appellate authorities concurrently found against the Revenue that no surcharge could be levied on the exemption fees paid by the respondent assessee for obtaining exemption certificate as a works contractor, specially by resorting to Section 37 of the RST Act.

3. Learned counsel for the petitioner Revenue has pointed out that the definition of tax under Section 2(41) of the RST Act, 1994 defines the “tax” to mean any tax or other levy by any name, leviable under the provisions of the Act and therefore, he submits that “exemption fees” paid by the respondent assessee would also fall within the definition of tax and therefore, the assessee would be liable to pay surcharge thereon as notified by the State Government and therefore, the appellate authorities have erred in rejecting the Revenue's appeals and hence, the Revenue has filed this revision petition.

4. Learned counsel for the petitioner Revenue has further brought to the notice of the court the notification dated 01.08.1998 (S.No. 1181), whereby the surcharge was imposed on the tax payable

under the Act. The said notification dated 01.08.1998 is reproduced hereunder for ready reference :-

> *"**S.No.1181 : F.4(37)FD/Tax Divn/98-72 dated 1.8.1998***
>
> *S.O.189.- In exercise of the powers conferred by S.13, RST Act, 1994, the State Govt. [.1.], hereby notifies that there shall be paid by a dealer a surcharge @ [15%] on the amount of the tax payable under the Act. Surcharge at the above rate shall also be payable on goods decalred to be of special importance in inter-State trade or commerce as enumerated under S.14, CST Act, 1956, if effective rate of tax applicable on these goods is less than 4%.*
>
> *It shall come in force with immediate effect."*

5. He has also relied upon the circular issued by the Commissioner of Commercial Taxes on 02.11.1999 (S.No. 1283A), which is also reproduced hereunder for ready reference :-

> **S.No.1283A : F.16 (59/45)/Tax/CCT/97/1684 dated 2.11.1999**
>
> कार्य संविदा एवं पट्टा कर वृत्तों में पदस्थापित अधिकारियों द्वारा प्राय: यह शंका जाहिर की जाती है कि कर मुक्ति प्रमाण पत्र धारक ठेकेदारों से कर मुक्ति शुल्क **(E.C.Fee)** पर अधिभार देय है अथवा नहीं? इस सम्बन्ध में स्पष्ट किया जाता है कि राज्य सरकार की अधिसूचना सं. प. **(27)** एफडी/कर अनु/98-72 दिनांक 1.8.1998 **[S.No.1181]** के तहत कर मुक्ति शुल्क **(E.C.Fee)** पर अधिभार देय है ।

अत: निर्देश दिये जाते हैं कि उक्त अधिसूचना की अनुपालना में कर मुक्ति प्रमाण पत्र धारक ठेकेदारों से कर मुक्ति शुल्क पर अधिभार की वसूली सुनिश्चित की जावे ।

6. Nobody has appeared on behalf of the respondent assessee despite service, therefore, the learned counsel for the petitioner Revenue was heard ex parte for the disposal of the revision petition at admission stage.

7. There is a well-settled difference between the two concepts of tax and fees and though the dividing line is thin and as per various decisions of the Hon'ble Supreme Court and this court, though the mathematical equation of *quid pro quo* of the fees payable under the provisions of the Act and benefit in lieu of that is not required to be established by the Revenue to justify the levy of fees, yet the character of fees is necessarily embedded with the concept of *quid pro quo,* whereas, the tax is a general revenue of the State imposed by virtue of charging provisions of a taxing statute under the legislative competence of the State. The levy of fees cannot be said to be the levy of tax, nor vice versa is true.

8. Admittedly, in the present case, the exemption fees paid by the

respondent assessee to obtain exemption certificate seeking exemption from payment of tax on the works contract, is the fees levied by the State Government in lieu of tax. Once such exemption fees is paid and exemption certificate is issued by the competent authority, there remains no question of payment of any tax by the assessee during the period which is covered by the exemption certificate. Irrespective of happening of taxable event of sale of goods used in the execution of works contracts, the exemption fees is payable at one time at the time of initially obtaining of the exemption certificate. The levy of surcharge necessarily goes with the happening of taxable event and tax becoming payable as per the charging provisions of the Act. The levy of surcharge on exemption fees cannot be justified under any circumstances, as neither the exemption fees is a 'tax' nor 'surcharge' on tax can *ipso facto* become 'additional' exemption fees.

9. In the present case, the said levy of surcharge on the exemption fees was made by the assessing authority governed by the circular issued by the Commissioner on 02.11.1999 quoted above. It has been held by this court in the case of ***Commercial Taxes Officer, AE-I, Kota Vs. M/s. Bombay Machinery Store, Kota*****,** SBSTR No. 183/2005 decided on 14.09.2007 that the power of the

Commissioner to issue such circulars is doubtful whereby the learned Commissioner giving a particular interpretation of law encroaches upon the quasi-judicial discretion of the assessing authorities in the matter of assessment and imposition of tax. The circular quoted above is exactly of that nature which mandates the assessing authority to realise surcharge on the exemption fees paid by the works contractor. Such circular is without any authority of law or the Sales Tax Act and consequently the same is liable to be quashed and the same is accordingly quashed. Relevant para No. 12 of the aforesaid judgment dated 14.09.2007 is reproduced hereunder :-

> *"12. Therefore, the proposition of law by the learned Commissioner in the impugned circulars that "as per legal position, 'transit' gets over as soon as a reasonable time elapses for the consignee to elect whether he would take the goods away or leave them in the transporters premises, because at the conclusion of reasonable time there is deemed to be a constructive delivery of goods from the transporter to the consignee", cannot be said to be a correct legal position. The subsequent Circular dated 15.04.1998 purportedly issued to ameliorate the situation for dealers created by previous circular dated 16.09.1997, merely ended up extending the time limit of 10 days to 30 days without undoing the damage done by the previous circular by propounding a particular view of constructive delivery. In fact, the very power to issue such circulars by the learned Commissioner giving a particular interpretation of law purportedly binding on*

all the assessing authorities is doubtful. There is no specific provision in the Sales Tax Act, either under the RST Act or under the CST Act, empowering the Commissioner to issue such circulars, as against such powers conferred under Section 119 of the Income Tax Act on the Central Board of Direct Taxes. Even Section 119 of the Income Tax Act, which empowers the highest administrative body under the Act, namely CBDT, by way of its proviso restricts and provides that no such order, instruction or direction shall be issued so as to require any Income Tax authority to make a particular assessment or dispose of a particular case in a particular manner and such orders or instructions shall also not interfere with the discretion of the Commissioner (Appeals) in exercise of its appellate functions. Therefore, this court cannot countenance the issuance of such circulars by the Commissioner of Sales Tax, which unduly fetter with the quasi-judicial discretion of the assessing authorities, who are expected in law to give their findings of fact and interpret the statutory law in their own quasi-judicial discretion in accordance with the law as interpreted by the Supreme Court or jurisdictional High Court. The circulars issued by the Commissioner in the aforesaid manner like done vide Circulars dated 16.09.1997 and 15.04.1998 are likely to hamper and throttle such quasi-judicial discretion which vests with the assessing authorities. Therefore, the aforesaid circulars issued by the Commissioner aforesaid on 15.04.1998 (S.No. 1132A) and 16.09.1997 (S.No. 1115B) are in conflict with the Division Bench decision of this court in Guljag Industries Ltd's case (supra) and even otherwise they are found to be without any authority of law. Consequently, both these circulars are found to be ultra vires and are hereby quashed.

10. Therefore, this court is of the opinion that no surcharge was leviable on the exemption fees paid by the assessee works contractor and therefore, the impugned levy of surcharge has been rightly set aside by both the appellate authorities below. While this could not be done even while exercising the regular assessment powers of the assessing authority, much less it could be so done by resort to Section 37 of the Act which pertains to rectification of apparent mistakes on the face of record. The non-imposition of surcharge on the exemption fees at the time of levy and realization of the exemption fees could not be said to be a mistake apparent on the face of the record so as to call for any rectification by resort to Section 37 of the Act. Therefore, the appellate authorities were also justified in holding that Section 37 of the Act could not be invoked for this purpose.

11. Consequently, there is no force in this revision petition and the same is dismissed with no order as to costs. A copy of this order be sent to the respondent assessee.

(Dr.VINEET KOTHARI),J.

Pramod
Item No. 5